

## Personality Merchandising in Nigeria: Prospects and Challenges

Dorcas A. Odunaike LL.B, LL.M, B.L, M.Phil, Ph.D  
Senior Lecturer, Department of Private and Commercial Law,  
Babcock University, Ilishan Remo, Ogun State, Nigeria

### Abstract

Personality merchandising is an emerging area of advertisement in Nigeria with legal connotations. The endorsement of a product or service by a well known personality has superior commercial advantage which has been offered legal protection internationally and in developed countries. The aim of this paper is to examine the legal protection of personality merchandising in Nigeria especially as it relates to personality right and to identify the challenges posed by endorsement of a product by a celebrity with the view of proffering recommendations that will enhance publicity values attached to celebrity personae.

**Keywords:** merchandising, celebrity, publicity, privacy, personality.

### 1. Introduction

Until recently Funke Akindele a.k.a Jenifa<sup>1</sup> endorse products and services simply as Funke Akindele. With the making of *Jenifa* film she assumes the character and name of Jenifa when endorsing products/services. Although it's the person known as Funke Akindele that assumes the role of Jenifa, they are not one and the same personality. Jenifa is a character distinct from Funke Akindele as an actress. To permit every actress to assume the character of *Jenifa* at will without the permission of the creator of that character is to allow others to reap where they did not sow<sup>2</sup>, this is personality right in action.

Internationally, Article 12 United Nation Declaration of Human Rights, 1948<sup>3</sup> guaranteed personality and privacy right when it provides "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks".

Nationally, Section 37 of the 1999 Constitution of the Federal Republic of Nigeria,<sup>4</sup> domesticates an aspect of the provisions of Article 12 cited above when it guaranteed "the privacy of citizens, their home, correspondence, telephone conversations and telegraphic communications".

Historically, the right of publicity developed in the United States in the 1930s when Walt Disney Studio in America created cartoon characters known as Mickey, Minnie and Donald and granted licenses for its commercial exploitation by having them drawn on posters, toys, badges, T-Shirt just to mention a few<sup>5</sup>. With time, the exploitation of literary characters emerged with the works of Beatrix Potter through books such as Peter Rabbit and Squirrel Nutkin and the work of Lewis Carroll-Alice in Wonderland<sup>6</sup>.

By the 1970s character merchandising of famous film characters such as Star Wars became the order of the day with great financial rewards for licensees of such rights with expansion in range of goods or services covered by such merchandising<sup>7</sup>.

Today marketing of goods and services has grown to cover the use of real personalities for merchandising, hence personality endorsement of goods and services is known as 'personality merchandising' and Nigeria is not left behind in this respect. Whereas in developed countries the rights of such personalities are greatly enhanced by existing laws on personality rights which entails publicity and privacy rights, it remains to be seen whether this is the case in Nigeria. The question then is whether in Nigeria an individual has property right in his/her personality? If yes, what does this right entail and whether the right of an individual to his/her personality has been effectively protected in Nigeria? These are some of the questions this paper seeks to answer.

The aim of this paper is to examine the applicable law on personality merchandising in Nigeria, if any, identify its inadequacies, with the view of proffering suggestions that will enhance compliance with the law. Furthermore, this paper is significant as a contribution to efforts to propose reforms that will further develop Nigerian domestic laws on personality rights in particular and intellectual property law in general.

<sup>1</sup> A renowned Nollywood actress that hails from the Western Part of Nigeria.

<sup>2</sup> In the same vein the mannerism and personality of 'Boy Alinco' and 'Papa Ajasco' a creation of Wale Adenuga's Production in Nigeria cannot be assumed by anyone without the consent of the creator.

<sup>3</sup> Available on line at <http://www.un.org/en/universal-declaration-human-rights/> accessed 6/7/16 at 11.32am.

<sup>4</sup> Cap. C23, Volume 3, Laws of the Federation of Nigeria, 2004 now updated as Laws of the Federation of Nigeria, 2010.

<sup>5</sup> WIPO, *Report on Character Merchandising*, (1994) available online at [www.wipo.int/pdf/wo/inf/108](http://www.wipo.int/pdf/wo/inf/108) , page 6, accessed 6/7/16 at 5.38pm.

<sup>6</sup> *Ibid*, at page 7.

<sup>7</sup> *Ibid*.

## 2. Theoretical and Conceptual Clarifications

Nigerian celebrities comprise of performers in the music and drama industry amongst others. The right of a performer is an aspect of intellectual property law that has generated interest among legal writers and jurists. The philosophical justification for intellectual property rights<sup>1</sup> also justify related rights<sup>2</sup>. The legal theories proffered as justifications for the protection of performance are three, namely utilitarian theory<sup>3</sup>, natural law<sup>4</sup> and labor theory<sup>5</sup>. However the personality theory offers greater justification for the concept of personality merchandising. The argument based in natural justice and equity is one of the jurisprudential basis of personality rights. The origin of this argument is the personality theory which describes property as an expression of self. Personality theory flows from Kant's philosophy of law and Hegel's philosophy of rights<sup>6</sup>.

According to Hegel<sup>7</sup> property is an expression of self and one's personality has a linkage with one's identity. Kant<sup>8</sup> on the other hand opined that any literary creation is fused with the author's personality and confers on the author the right of legal protection<sup>9</sup>. Civil rights doctrine of rights of expression and privacy provides a foundation for personality theory in intellectual property. In the civil law tradition, *droit d'auteur*<sup>10</sup> is conceived as an aspect of individual's natural rights<sup>11</sup>.

Thus, Sanhita Ambast<sup>12</sup>, opines that a performance is seen as an extension of the performers' personality and a part of his property, the control over these rights being natural right of humans. In actual fact, "nothing is more personal than a person's right to his/her honour and reputation"<sup>13</sup>.

Like property, goodwill/reputation is bought and sold every day, although it has been described as a property without a precise local situation. It may be acquired in any of the different ways in which property is usually acquired and can be disposed off under the condition attaching to property of that nature<sup>14</sup>.

It is worthy of note that the natural justice approach is constitutionally guaranteed in Nigeria. Section 33 of the 1999 Nigerian Constitution protects the right over life (performance personality) and Section 43 guaranteed the right to property (produce of his mind), which is the basis of performers' rights. In addition, performers' right is expressly provided for under Sections 26-30 of the Copyright Act, Cap. C28, Laws of the Federation of Nigeria, 2004. To this end, personality rights are entrenched in the Nigerian law although not expressly stated as such but otherwise as performers' rights.

To understand the concept of personality merchandising it is important to define the word 'personality' and 'merchandising'. The word 'personality' is not defined under the Nigerian law. The concept of 'persona' refers to "any unique aspect of the individual capable of appropriation by a third party"<sup>15</sup>. 'Personality' on the other hand has been defined as the "physical, mental and social characteristics that publicly identify an

---

<sup>1</sup> Intellectual Property Rights (IPR) encompasses the legal rights granted with the aim to protect the creations of the intellect. Such rights are Industrial Property Rights (e.g. patents, industrial designs and trademarks) and Copyright (right of the author or creator) and Related Rights (rights of the performers, producers and broadcasting organisations). Available on line at <https://www.iprhelpdesk.eu/kb/34-what-meaning-term-intellectual-property-rights-iprs> accessed 03 February, 2016.

<sup>2</sup> Related rights have been defined as the intellectual property right of performers and expression of folklore (in Nigeria). In other jurisdiction such as United Kingdom, producers of sound recording and broadcasters are included.

<sup>3</sup> Utilitarian's justify the legal protection of personality right by arguing that "greater protection leads to greater economic gains which leads to greater incentive for performers, greater development of the art and thus greater public good". Sanhita Ambast, *Protecting Performers' Rights: Does India Need Law Reform?*, Journal of Intellectual Property Rights (2008), Vol.13, November, page 578.

<sup>4</sup> The natural law theory argues that some rights are natural and inherent by virtue of human nature See Natural Law, Wikipedia available online at [https://en.wikipedia.org/wiki/Natural\\_law](https://en.wikipedia.org/wiki/Natural_law) accessed 10/10/16 at 11.38am.

<sup>5</sup> Michael Gruenberger, *A Duty To Protect The Rights Of Performers Constitutional Foundations Of An Intellectual Property Rights*, Cardozo Arts and Entertainment, Vol.24:617, (2006) at p. 654.

<sup>6</sup> Hegel's philosophy of rights acknowledges an "individual's will as the core of his/her existence constantly seeking actualization". According to him "personality is the first, still wholly abstract, determination of the absolute and infinite will, it actualizes itself through different level of activity and at times it manifest itself in some objects through occupation and embodiment", he characterized possession of the object as the initial step in property. Justin Hughes, *Philosophy of Intellectual Property*, 1988 Geo.L.J. 287 at pages 29-30.

<sup>7</sup> Peter S. Merrell, *Intellectual Property: General Theories*, (1999) available on-line at <http://www.dklevine.org/archive/ittheory.pdf> accessed 13/10/12.

<sup>8</sup> Ibid.

<sup>9</sup> Golvan. C & Mc.Donald M. *Writers and the Law*, The Law Book Company Limited, Sydney, (1986) p. 157.

<sup>10</sup> Latin word meaning 'author's rights'.

<sup>11</sup> Richard Arnold, *Performers' Rights*, Sweet & Maxwell, London, (2008) at p. 4 para.1.12.

<sup>12</sup> Sanhita Ambast, *ibid*.

<sup>13</sup> Morgan Owen, *International Protection of Performers' Rights*, Hart Publishing, Portland, (2002) at page 109.

<sup>14</sup> Per Lord Macnaghten in *Commissioners of Inland Revenue v Priestley* (1901) A.C 217 at 223-224.

<sup>15</sup> Barbara Singer, *The Right of Publicity: Star Vehicle or Shooting Star?* (1991) 10 *Cardozo Arts and Entertainment Law Journal* 1.

individual or character”<sup>1</sup>.

According to Laddie J. “merchandising is the exploitation of images, themes or articles which have become famous in order to enhance or make available a large number of product(s) which could be bought by members of the public who wanted a reminder of it”<sup>2</sup>. In other words, merchandising covers activities that advance images and visibility of products. Therefore, personality merchandising can be defined as exploitation of the unique aspect of an individual in marketing a product or services, a process which has been described as a profitable embellishment to business strategy.

Research has revealed that the choice made by consumers at times depend on the appeal made by the manufacturer to their sense of touch, sight and feelings; without any doubt, good merchandising greatly influence the choice of the people. The question however is, whether the law protects the physical or the social characteristics that publicly identify an individual or character?

It is trite that the principle of law applicable to personality merchandising does not protect the name of a celebrity but the goodwill attached to the use of such name. “Apart from the law as to trade marks, no one can claim monopoly rights in the use of a word or name. On the other hand, no one is entitled to the use of any word or name, or indeed in any other way to represent his goods as being the goods of another to that other’s injury. If an injunction be granted in restraining the use of a word or name, it is no doubt granted to protect property, but the property...is not property in the word or name but property in the trade or good-will which will be injured by its use”<sup>3</sup>.

The definition of ‘goodwill’ has been extended judicially to cover “the benefit and advantage of the good name, reputation and connection of a business, the attractive force which brings in customers”<sup>4</sup>, hence, the legal protection of personality merchandising.

### 3. Legal Protection of Personality Merchandising

Civil law jurisdictions have traditionally offered legal protection to personality merchandising as an aspect of personal privacy worthy of protection though non-proprietary in nature. Whereas in common law jurisdictions<sup>5</sup> legal redress can be taken against exploitation and appropriation of personality through existing intellectual property rights such as Trade Mark or the tort of passing-off, action in defamation and breach of confidence. Nigeria being a former colony of Britain falls into the latter category, a jurisdiction without a specific law that protects publicity right. Hence it’s important to examine specifically the various genres of intellectual property rights namely copyright, trade mark, tort of passing-off, action in defamation and breach of confidence as it relates to personality rights.

#### 3.1 Intellectual Property Right

The provisions of Part II of the Copyright Act<sup>6</sup> embodied legal protection of performer’s rights. Since most celebrities engage in musical and dramatic performances with exclusive right to authorize the performing, recording, broadcasting live, reproduction in any material form and adaptation of such performances, copyright law may in appropriate cases be extended to cover right of an individual to legal protection of his/her personality. It is however worthy of note that this can be so, in so far as it is a live performance<sup>7</sup>. Furthermore, copyright offered legal protection where the image of a celebrity (photographs taken with his/her consent) is reproduced without permission from the owner of copyright in the photograph or where such image is used for commercials without his/her consent.

Be that as it may, by the provision of the 1999 Constitution (cited above) which is the *fons et origo*<sup>8</sup> of Nigerian law, right to privacy is enshrined in the Nigerian law. However, the law seems to be lacking enormously in the aspect of case law interpreting this section to swathe the possible exploitation of a celebrity’s likeness. Therefore heavy reliance will be placed on foreign cases which are not binding on Nigerian courts but persuasive.

Since aspects of personality legally protected in civil law jurisdictions includes name and signature amongst others, the provisions of the Trade Mark Act may be interpreted to protect celebrity’s name and

<sup>1</sup> Robert Howell, The Common Law Appropriation of Personality Tort, 2 *Intellectual Property Journal*,(1986) 149 at 151.

<sup>2</sup> Laddie J. in *Irvine & Another v Talksport Limited* (2002) 2 All E.R 414.

<sup>3</sup> Parker J in *Burberrys v JC Cording & Co Limited* (1900) 26 RPC 693 at 701.

<sup>4</sup> *Commissioners of Inland Revenue v Priestley* (1901) A.C 217 at 223-224

<sup>5</sup> In *Campbell v Mirror Group Newspapers Limited* (2004) 2 A.C 457 at 464, per Simon L.J opined that ‘English law did not provide for free-standing rights with regard to character exploitation enjoyable exclusively by the celebrities’

<sup>6</sup> *Ibid.*

<sup>7</sup> See Section 26 of the Nigerian Copyright Act, op.cit.

<sup>8</sup> Latin word which means ‘fountain or source’ See further Per Karibi Whyte J.S.C in *Prince Adigun & Others v Attorney General of Oyo State and others* (1987) 2 NWLR (pt. 56) 197.

signature where such forms part of the mark of a trade<sup>1</sup>. Section 67(1) of the Trade Marks Act defines a mark as “a device, brand, heading, label, ticket, *name, signature*, word, letter, numeral, or any combination thereof”.

For a Trade Mark to be registrable it must contain or consist of at least one of the following (a) the name of a company, *individual*, or firm, represented in a special or particular manner (b) the *signature of the applicant* for registration or some predecessor in his business; (c) an invented word or invented words; a word or words having no direct reference to the character or quality of the goods and not being according to its ordinary signification a geographical name or surname; (e) any other distinctive mark<sup>2</sup>. To this extent, where the name or signature of a celebrity represents the brand of a trade and is registered as such, legal protection is conferred.

With regard to trade marks in Nigeria the provisions of Sections 5 and 6 of the Trade Marks Act<sup>3</sup> which deals with rights given by registration will apply. According to Section 5 registration of a mark under Part A will confer on that person the exclusive right to the use of that mark in relation to goods and whoever (not being the proprietor or registered user) uses a mark identical with it or so nearly resembling it as to likely deceive or cause confusion in the course of trade in relation to any goods in respect of which it is registered and in such a manner as to render the use of the mark likely to be taken either as being used as a trade mark or as importing a reference to some person having the right either as proprietor or as registered user to use the trade mark, shall be deemed to have infringed such mark<sup>4</sup>.

Also by Section 1(a) of the Trade Malpractices (Miscellaneous Offences) Act<sup>5</sup>, *any person who advertises any product*<sup>6</sup> in a manner that is false or misleading or likely to create a wrong impression as to its quality, character, brand name, value commits an offence and is liable on conviction to a fine of not less than N50,000. This Section may be extended to cover false endorsements and misrepresentation of a celebrity as a brand ambassador of a product that he/she does not approve of.

Finally, Section 5(2) (a) of the Trade Marks Act<sup>7</sup> by extension protects personality merchandising when it provides for the “use of a mark in physical relation to goods...or other advertisements issued to the public”. This can be so if the definition of mark under Section 67 of the Act is defined to include ‘image’ as in other civil law jurisdictions.

### 3.2 Defamation, Tort of Passing off and Breach of Confidence

Hitherto publication of false information about a celebrity is protected under the tort of defamation,<sup>8</sup> either in form of libel or slander<sup>9</sup>. Libel is publication of false information that is damaging to a celebrity’s reputation while slander is speaking a false statement that is damaging to a celebrity’s reputation. It is worthy of note that in appropriate cases, false endorsement action also falls under defamation law<sup>10</sup>. Hence every publication that breaches the privacy of celebrity is redress through the action of defamation.

As the scope of the misuse of private information unfolds it extends to cover the (i) prevention of untrue publication about celebrity’s private life and (ii) misuse of celebrity’s private information. Subsequently, the English Courts have held in a plethora of cases that unauthorized exploitation of a personality results in loss of publicity value<sup>11</sup>.

In *Campbell v MGN Limited*<sup>12</sup> it was held that since privacy could fall within the confines of breach of confidence there was no need to create a new cause of action. Before this case the position of the law is that celebrities could rely only on action of defamation to prevent publication of false information.

<sup>1</sup> For instance the name of David Beckham and Victoria Beckham has been trade marked with a turnover of over 5million pounds see ‘Brand Beckham: Designs and Trade Marks Registered by David and Victoria’ available online at <http://blogs.bl.uk/patentsblog/2012/12/brand-beckham-designs-and-trade-marks-registered-by-david-and-victoria.html> accessed 11/10/16 at 9.46pm.

<sup>2</sup> Section 9 of the Patent Act op.cit.

<sup>3</sup> Cap. T13, Laws of the Federation of Nigeria, 2004, now updated as Vol. 14, Laws of the Federation of Nigeria, 2010.

<sup>4</sup> In the Nigerian decided case of *Trebor Nigeria Limited v Associated Industries Limited* (1971) A.N.L.R 468, the trade mark of the defendant, a black elephant, was very distinctive of the defendant’s goods and held not to infringe that of the plaintiffs.

<sup>5</sup> Cap. T12, Laws of the Federation of Nigeria, 2004 now reprinted in Vol. 14, Laws of the Federation of Nigeria, 2010.

<sup>6</sup> Emphasis mine, this phrase acknowledges personality endorsement of a product through advertisement.

<sup>7</sup> Ibid.

<sup>8</sup> Libel: Nollywood Actress Nuella Warns Gossip Columnist Stella Dimoko Korkus Against Publishing False Stories About Her, available online at <http://www.africamusicalaw.com/libel-nollywood-actress-nuella-warns-gossip-columnist-stella-dimoko-korkus-against-publishing-false-stories-about-her/> accessed 11/10/16.

<sup>9</sup> Defamatory matter is any matter likely to injure the reputation of any person or likely to damage any person in his profession or trade by any injury to his reputation see Section 373 of the Criminal Code Act Cap. C38 Laws of the Federation of Nigeria 2004, now reprinted in Vol. 4 Laws of the Federation of Nigeria, 2010.

<sup>10</sup> In *Henderson v Radio Corp (1969) RPC 218* the professional reputation of the claimant ballroom dancers was considered to be injured by the wrongful appropriation of their pictures on the defendants record covers.

<sup>11</sup> *Irvine v Talksport op.cit.*

<sup>12</sup> (2004) 2 WLR 1232.

To crown it all, the tort of passing off vindicates the exclusive right of a celebrity to his/her reputation or goodwill. Historically, the tort of passing off dates back to the case of *Perry v Truefitt*<sup>1</sup> where the court discouraged the sale of one's goods under the pretence that they are goods of another person. This tort has been expanded in recent times to grant relief to a celebrity whose photograph has been misrepresented to endorse a product in circumstances which suggests that he endorsed a radio station program tagged Talk sport<sup>2</sup>.

It is trite law that if someone acquires a valuable reputation or goodwill the law of passing off will protect it from unlicensed use by other parties<sup>3</sup>. In the case of *Moorgate Tobacco Co Limited v Philip Morris Limited*<sup>4</sup> Deane J, approved of the adaptation of the traditional doctrine of passing off to deceptive or confusing use of names of celebrity in order to persuade consumers to believe that such goods or services have an association with or have the endorsement of such a person. Therefore, an action will lie in the tort of passing off in respect of personality merchandising when the appearance of a personality in respect of the endorsement of a product is such as to mislead the members of the public into believing that what they are purchasing has the endorsement of their celebrity when in actual fact it doesn't and injury is likely to accrue to the personality by reason of such unauthorized use.

On whether the cause of action for passing off applied to false endorsements, Laddie J, in *Irvine & Another v Talk sport Limited*<sup>5</sup> held that there was no good reason why the law of passing off in its modern form and in modern trade circumstances should not apply to cases of false endorsement. If someone acquired a valuable reputation or goodwill the law of passing off would protect it from unlicensed use by other parties. Such use would frequently be damaging in the direct sense that it would involve selling inferior goods or services under the guise that they were from the claimant.

Over the years courts have treated private information about celebrities as confidential. The reason for this is not farfetched, wrongful release of an individual's personal information constitutes a breach of the right to privacy.<sup>6</sup> Thus, action for breach of confidence has in appropriate cases been applied to protect celebrity's privacy. Privacy can be invaded by publication of private information of celebrities without their consent or by further publication of information or photographs already disclosed to the public.

Per Lord Nicholls in *Campbell v MGN*<sup>7</sup> "the law imposes a duty of confidence whenever a person receives information which he knows or ought to know as confidential... whether or not there is a relationship of confidence between parties a duty of confidence will arise between parties in a situation where the defendant knows or ought to know that the other person can reasonably expect his privacy to be protected".

The position of the law is however different where the information sought to be protected is already in public domain. In *PJS v News Group Newspapers Limited*<sup>8</sup> the claimant, a celebrity married with children sought an injunction to prevent the Sun on Sunday Newspaper from publishing a story about his sexual activities. The defendant argued that the claimant presented an image of monogamy to the entire world, hence, it is in the interest of the public to correct this false image with reference to his casual sexual relationship, the court granted the injunction and the defendant appealed. Pending the hearing of the appeal the story was published on social media, United States of America, Scotland and Canada, therefore the defendant appealed to have the injunction overturned since information was already in the public domain. The court of appeal discharged the injunction based on this and other reasons.

It is worthy of note that the decision of the court in the above mentioned case brought to limelight the challenges posed by online infringement. The decision of the court in *Oliver Martinez v MGN Ltd*<sup>9</sup> revealed that even where a particular jurisdiction fails to recognize personality merchandising parties may still be held liable for infringements in other jurisdictions especially in cases of online infringements.

#### 4. Prospects of personality merchandising in Nigeria

Product endorsement by Nollywood personalities in order to draw out consumers in alleged loyalty to a brand is not surprising as Nigeria is Africa's most populous country and the third largest movie producing country in the world with annual revenue in the region of US\$200 to 300 million<sup>10</sup>.

<sup>11</sup> (1842) E.R 749.

<sup>2</sup> *Irvine & another v Talk sport Limited* (2002) 1 WLR 2355 at 2368.

<sup>3</sup> As far back as 1931, the Court in the case of *British Medical Association v Marsh* (1931) 48 RPC 565, applied passing off law to prevent false endorsement.

<sup>4</sup> (1984) 56 ALR 193 at 214.

<sup>5</sup> Ibid.

<sup>6</sup> Chapter 7, Guidelines on the Implementation of Freedom of Information Act, 2011, Issued by the Attorney General of the Federation and Minister of Justice, 15<sup>th</sup> March, 2012.

<sup>7</sup> (2004) 2 A.C 457 at 464.

<sup>8</sup> (2016) 2 WLR 1253.

<sup>9</sup> (2012) EMLR 12.

<sup>10</sup> Afam Ezekude, (2012), *Nigeria's Anti-Piracy Drive Yields Results*, WIPO Magazine, Issue 3, (June) available on-line at

Personality merchandising as an emerging mode of advertisement has come to stay in Nigeria as talented Nigerians in the drama and music industry such as P-Square<sup>1</sup>, D Banj<sup>2</sup>, Omotola Jalade-Ekeinde,<sup>3</sup> Genevieve, just to mention a few, have placed Nigeria on the world map through their performances and have contributed in no small measure to positive development of the image of Nigeria and nation building. Hence, heavy reliance is placed by major companies on celebrities for the marketing of their goods and services in order to enhance economic benefits and exposure of Nigerian entertainers.

For instance a whole lot of artistes<sup>4</sup> have been signed as brand ambassadors for Adenuga's Globacom who through advertisement attest that Glo is the best telecommunication outfit in Nigeria. These celebrities serve as the image<sup>5</sup> (brand ambassadors) of the company even though they aren't registered as such.

MTN is not left behind as it announces brand ambassadors for 2016/2017.<sup>6</sup> Musicians such as Praiz (Praise Adejo); Iyanya (Iyanya Mbuk); Chidinma (Chidinma Ekile); Falz (Folarin Falana); Tekno Miles (Augustine Kelechi) and Skales (Raoul Njeng-Njeng) have been provided with an alternative platform for making money through personality merchandising. Four other ambassadors are actors in Nollywood namely, Saka, (Hafiz Oyetoro); Nedu (Steve Onu); Osuofia (Nkem Owoh) and Adamu Zango.

Etisalat and Airtel are also not left behind, recently Etisalat endorsed Eniola Babdmus (a.k.a gbogbo biz girl)<sup>7</sup> as their brand ambassador<sup>8</sup> she now joins Ice Prince, Olamide and Francis Odega as Etisalat Ambassadors. Airtel on the other hand endorsed Patoranking, 2Face Idibia, Ik and Phyno as brand ambassadors<sup>9</sup>.

Based on market survey, a person is unconsciously drawn to trust a product being marketed by a familiar face, especially if you are the fan of such celebrity advertising the product or whose face appears on the product. Of a truth, the image of a popular celebrity is more inviting than that of a random person or an elaborate trademark. For instance, Tiwa Savage and son advertisement of Pampers Diapers has convinced mothers to use the same product for their child, subsequent advertisement of Pampers attest to the number of her fan base that in turn uses Pampers simply because its being associated with Tiwa Savage and son<sup>10</sup>.

Aside from this advantage, personality merchandising also helps to redefine or refresh the brand image. For well established companies, it can give a lease of life to the brand image.

Another prospect is that it facilitates the targeting of different market segments. For instance, the busy housewife would be drawn to products endorsed by 'Eucharua Anunobi Eku<sup>11</sup>' or 'Rita Dominic<sup>12</sup>'. The newlywed wife would be attracted to products endorsed by Toke Makinwa<sup>13</sup>, while young girls/ females will find products endorsed by Uti Nwachukwu<sup>14</sup> more appealing.

The importance of personality merchandising cannot be overstated. Examples of personality merchandising in Nigeria includes

- Products bearing name of Nollywood actors/actresses<sup>15</sup>.

---

[www.wipo.int/wipo\\_magazine/en/2012/03/article\\_0004.html](http://www.wipo.int/wipo_magazine/en/2012/03/article_0004.html), accessed 4/6/13.

<sup>1</sup> P-Square are Nigerian R & B identical twin brothers Peter Okoye and Paul Okoye.

<sup>2</sup> D banj's real name is Dapo Daniel Oyebanjo, he is Nigeria's first United Nations Youth Ambassador for Peace, as reported by *The Street Journal*, D'Banj Named African Ambassador For Apple's Beats by Dre, on 10<sup>th</sup> October, 2014, available online at [www.thestreetjournal.org](http://www.thestreetjournal.org) accessed 17/9/15 at 8.11pm.

<sup>3</sup> She made the list of the 100 most influential people in the world as reported in the 2013 edition of Times Magazine, reported by Temitayo Famutimi in THE PUNCH, April 10, 2013, p. 47.

<sup>4</sup> As at date Globacom Ambassadors totalled 31 in numbers, see <http://www.gloworld.com/ng/sponsorship/glo-ambassadors/> accessed 10/10/16 at 12.36pm.

<sup>5</sup> Section 67 of the Trade Marks Act, Cap. T13 Laws of the Federation of Nigeria, 2004 updated in 2010, defines a mark as "a device, brand, heading, label ticket, name, signature, word, letter, numeral or any combination thereof".

<sup>6</sup> <http://www.thisdaylive.com/index.php/2016/09/05/mtn-announces-brand-ambassadors-for-2016-2017/> accessed 10/10/16 at 12.52pm.

<sup>7</sup> Is an alias for a lady that engages in all forms of business whether morally right or not.

<sup>8</sup> <http://www.thebriefng.com/2016/04/12/eniola-badmus-now-list-etisalat-brand-ambassadors/> accessed, 10/10/16 at 1.03pm

<sup>9</sup> <http://thenet.ng/2015/06/2face-phyno-patoranking-others-unveiled-as-brand-ambassadors-of-airtel/> accessed 10/10/16 at 1.00pm.

<sup>10</sup> Moms from all over Nigeria join Tiwa Savage to endorse the improved Pampers Baby Dry <https://www.bellanaija.com/2016/04/moms-from-all-over-nigeria-join-tiwa-savage-to-endorse-the-improved-pampers-baby-dry-photos/> accessed 10/10/16 at 12.06pm.

<sup>11</sup> A Nigerian actress, producer and Pastor see Wikipedia [http://en.m.wikipedia.org/wiki/eucharua\\_anunobi](http://en.m.wikipedia.org/wiki/eucharua_anunobi) accessed 10/10/16 at 1.07pm.

<sup>12</sup> A Nigerian actress, see Wikipedia [http://en.m.wikipedia.org/wiki/rita\\_dominic](http://en.m.wikipedia.org/wiki/rita_dominic) accessed 10/10/16 at 1.07pm.

<sup>13</sup> A Nigerian radio personality that co-host The Morning Drive on Rhythm 93.7 fm, television host and vlogger, see Wikipedia [http://en.m.wikipedia.org/wiki/toke\\_makinwa](http://en.m.wikipedia.org/wiki/toke_makinwa) accessed 10/10/16 at 1.12pm.

<sup>14</sup> The winner of Big Brother Africa 5, now an actor, singer, model and television presenter, see 9 Things You Should Know about Uti Nwachukwu available online at <http://www.pulse.ng/movies/pulse-list-9-things-you-should-know-about-uti-nwachukwu-id4037470.html> accessed 10/10/16 at 1.17pm.

<sup>15</sup> St. Genevieve clothing line named after Nollywood actress Genevieve Nnaji.

- Campaign adverts for political parties by famous Nollywood actors/actresses<sup>1</sup>.
- Advertisement of telecom outfits by brand ambassadors<sup>2</sup>.
- Sports promotional adverts by footballers such as J.J Okocha, Kanu Nwankwo<sup>3</sup>.
- Launching of new products by famous actress attesting to its effectiveness<sup>4</sup>.

## 5. Challenges of Personality Merchandising

The endorsements of a large number of celebrities as brand ambassadors by some telecom companies constitute an attempt to keep these celebrities at the expense of rival companies. Perhaps this desire is borne out of the fear that other companies may cash in on the goodwill of the celebrity to attract customers to product of rival company if let go.

While reputable companies can afford celebrities (as brand ambassadors) for the use of their likeness to market their business/products; the low scale ones that either cannot afford or refuse to buy into the concept bypass the legal procedure and just engage in personality merchandising either way. This type of action was legally redressed in the case of *Talmax Property Limited v Telstra Corporation Limited*<sup>5</sup> where the unauthorized use of the photograph of Kieren Perkins a distinguished sports personality was remedied on the ground that the unauthorized publication diminished, blurred or reduced the opportunity of the personality to exploit his name, image and reputation.

Unauthorized use of celebrity's images and photograph on signage and business premises is a common infringement in Nigeria<sup>6</sup>. It is however worrisome that some celebrity's do not see anything wrong with this act of infringement. To some, it is beneficial in the sense that they are being promoted without any effort or resources being invested into the venture whereas unknown to them these unauthorized use ride off the goodwill of the high profile personalities free of charge.

In another sense, the slightest association with a particular brand diminishes the personality of a celebrity especially in situations where the personality of such celebrity is used in respect of a faulty or substandard product.

The issue of personality merchandising/image advertising is one that poses a great challenge to the Nigerian society given the fact that she is still a developing nation. In the current economic downturn every Nigerian is seeking means to ensure he or she is at the peak of his game in order to put food on the table. In the quest for this, many dabble into various means of advertising their goods using popular celebrities and stars which they prior to the usage never had any agreement with<sup>7</sup>. The image is usually used despite the quality of the product and this might encourage the sale of inferior goods under the pretext that the product is of commendable quality.

Another challenge posed by personality merchandising is the tying down of celebrities by those who can afford to pay for their services. Recently Globacom insisted that P-Square who happen to be their flagship brand ambassador in 2010 remains their ambassador while at the same time signing other celebrities as brand ambassador<sup>8</sup>.

It is also important to highlight the absence of a specific law protecting publicity right in Nigeria. As expatiated above, applicable law ranges from Copyright, Trade Mark, Law of Tort, Trade Malpractices Act,

<sup>1</sup> Ice Prince, Funke Akindele, Yemi Alade, Olamide, Banky W, Dammy Krane, Obafemi Martins, Desmond Elliot and a whole lot of other celebrities endorsed Akinwunmi Ambode through their campaign advert for APC gubernatorial election in Lagos in the year 2015. See Political Advertising: When Nigerian Celebrities Join Lagos APC Candidate, Ambode in 'I Believe' Campaign, available online at <http://brandarena.com.ng/2015/01/political-advertising-when-nigerian.html> accessed 10/10/16 at 1.24pm. In the same vein, Onyeka Onwenu, Ibinabo Fiberesima, Daddy Showkey, Ini Edo, Rita Dominic, Kate Henshaw, KCEE, Fred Amata, Segun Arinze, Zeb Ejiro and other celebrities too numerous to mention publicly throw their weight and resources behind the re-election of Goodluck Jonathan PDP Presidential candidate in 2015. See <http://thenet.ng/2015/02/2015-elections-who-entertainers-are-supporting-and-why/> accessed 10/10/16 at 1.33pm.

<sup>2</sup> Funke Akindele and 27 other Glo ambassadors have endorsed Globacom telecommunication outfit to Nigerian users.

<sup>3</sup> For example, sports promotional advert for Peak Milk by Kanu Nwankwo and son see Kanu Nwankwo and his son advert available on line at <https://m.youtube.com/watch?v=1ny4vIQels> accessed 10/10/16. Also Jay Jay Okocha, Joke Silva, Toke Makinwa and other stars support Malta Guinness Game on, available on line at <http://theeagleonline.com.ng/jay-jay-okocha-joke-silva-toke-makinwa-other-stars-support-malta-guinness-game-on/> accessed 10/10/16 at 1.54pm.

<sup>4</sup> An example of which is Bukky Wright (Nigerian actress) endorsement of Harpic disinfectant product.

<sup>5</sup> (1997) 2 Q.D.R 444.

<sup>6</sup> Frozen Food outlets and Hairdressing Salon use Funke Akindele's photograph on their sign board without her consent and legal redress.

<sup>7</sup> 'Stop Using My Name for Publicity' Actress Issues 48hours Ultimatum to Akpororo available online at <http://pulse.ng/celebrities/kate-henshaw-stop-using-my-name-for-publicity-actress-issues-48hours-ultimatum-to-akpororo-id5203665.html> accessed 11/10/16.

<sup>8</sup> 'P Square Remains Our Ambassadors -Glo' available online at <http://www.informationng.com/2016/03/p-square-remain-our-ambassadors-glo.html> accessed 11/10/16 at 11.38pm.

1999 Constitution among others. It is high time Nigeria provide for a celebrity's publicity right.

Finally, there is an unwritten rule that when a celebrity endorses a product, he/she should not cross carpet to endorse the product of a competitor. The recent endorsement of Etisalat by Saka<sup>1</sup> only for him to port<sup>2</sup> to MTN is worrisome<sup>3</sup>. This singular act has made other companies to find him unreliable.

## 6. Conclusion

In conclusion, whilst developed countries takes proactive steps in ensuring the legal protection of personality merchandising through publicity rights, piecemeal legal protection permeates the Nigerian law, it is therefore important that this lacuna in the Nigeria law be filled through the promulgation of a law on publicity right.

Nigerian society is a community gripped with fame hence licensing of celebrities for merchandising of products and services is fast becoming a lucrative venture. It is therefore important to create public awareness through media and efforts of private intellectual property organizations in enlightening the Nigerian populace on the effects of infringing personality rights contrary to the permission of the celebrity involved. The need to keep everyone abreast of the imminent dangers not only on the personality's identity but also the adverse effects it can pose on their undertaking is very important. Also with the dearth of litigation on the right of a personality, the need to take intellectual property right as a personal right cannot be over-emphasized.

Finally it is important that the definition given under Section 67<sup>4</sup> of the Trade Mark Act which defines a mark as "a device, a brand, heading, ticket, name, signature, word, numeral or any combination thereof" should be rephrased to include the fact that an "image which is used in relation to trade can also constitute a mark to ensure protection for images as evident in other jurisdictions like United States of America and several other nations of the world that have all ascended the height of a balanced and enforceable system of intellectual property.

## References

- Afam Ezekude, *Nigeria's Anti-Piracy Drive Yields Results*, WIPO Magazine, Issue 3, (June) available on-line at [www.wipo.int/wipo\\_magazine/en/2012/03/article\\_0004.html](http://www.wipo.int/wipo_magazine/en/2012/03/article_0004.html), accessed 4/6/13, (2012)
- Barbara Singer, *The Right of Publicity: Star Vehicle or Shooting Star?* 10 *Cardozo Arts and Entertainment Law Journal* 1, (1991).
- 'Brand Beckham: Designs and Trade Marks Registered by David and Victoria' available online at <http://blogs.bl.uk/patentsblog/2012/12/brand-beckham-designs-and-trade-marks-registered-by-david-and-victoria.html> accessed 11/10/16.
- Golvan. C & Mc.Donald M. *Writers and the Law*, The Law Book Company Limited, Sydney, (1986)
- Guidelines on the Implementation of Freedom of Information Act, 2011, Issued by the Attorney General of the Federation and Minister of Justice, 15<sup>th</sup> March, 2012.
- Libel: Nollywood Actress Nuella Warns Gossip Columnist Stella Dimoko Korkus Against Publishing False Stories About Her, available online at <http://www.africamusicalaw.com/libel-nollywood-actress-nuella-warns-gossip-columnist-stella-dimoko-korkus-against-publishing-false-stories-about-her/> accessed 11/10/16.
- Michael Gruenberger, *A Duty To Protect The Rights Of Performers Constitutional Foundations Of An Intellectual Property Rights*, *Cardozo Arts and Entertainment*, Vol.24:617, (2006).
- Morgan Owen, *International Protection of Performers' Rights*, Hart Publishing, Portland, (2002).
- Natural Law, Wikipedia available online at [https://en.wikipedia.org/wiki/Natural\\_law](https://en.wikipedia.org/wiki/Natural_law) accessed 10/10/16.
- Peter S. Merrell, *Intellectual Property: General Theories*, available on-line at <http://www.dklevine.org/archive/ittheory.pdf> (1999)
- 'P Square Remains Our Ambassadors -Glo' available online at <http://www.informationng.com/2016/03/p-square-remain-our-ambassadors-glo.html> accessed 11/10/16 .
- 'Saka Dumps Etisalat for MTN over N20m Deal' available on line at <http://www.vanguardngr.com/2013/04/saka-dumps-etisalat-for-mtn-over-n20m-deal/> accessed 11/10/16.
- 'Stop Using My Name for Publicity' Actress Issues 48hours Ultimatum to Akpororo available online at <http://pulse.ng/celebrities/kate-henshaw-stop-using-my-name-for-publicity-actress-issues-48hours-ultimatum-to-akpororo-id5203665.html> accessed 11/10/16.
- 9 Things You Should Know about Uti Nwachukwu available online at <http://www.pulse.ng/movies/pulse-list-9-things-you-should-know-about-uti-nwachukwu-id4037470.html> accessed 10/10/16.
- Richard Arnold, *Performers' Rights*, Sweet & Maxwell, London, (2008).

<sup>1</sup> A renowned actor.

<sup>2</sup> An acceptable Nigerian slang for migrating from one telecom network operation to another.

<sup>3</sup> 'Saka Dumps Etisalat for MTN over N20m Deal' available on line at <http://www.vanguardngr.com/2013/04/saka-dumps-etisalat-for-mtn-over-n20m-deal/> accessed 11/10/16 at 11.43pm.

<sup>4</sup> Trade Mark Act, Cap. T6, Laws of the Federation of Nigeria, 2004.



---

Robert Howell, The Common Law Appropriation of Personality Tort, 2 *Intellectual Property Journal*, (1986).  
Sanhita Ambast, *Protecting Performers' Rights: Does India Need Law Reform?*, *Journal of Intellectual Property Rights*, Vol13, November, 2008.  
Temitayo Famutimi in THE PUNCH, April 10, 2013.  
*The Street Journal* , D'Banj Named African Ambassador For Apple's Beats by Dre, on 10<sup>th</sup> October, 2014,  
WIPO, *Report on Character Merchandising*, (1994) available online at [www.wipo.int/pdf.wo/inf/108](http://www.wipo.int/pdf.wo/inf/108) , page 6, accessed 6/7/16.